Supreme Court of the United States

No. 117.—October Term, 1902.

George Bleistein, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing and Edwin Fleming, doing business under the name of The Courier Company and The Courier Lithographing Company, Plaintiffs in Error, *vs.* The Donaldson Lithographing Company.	In error to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 2, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This case comes here from the United States Circuit Court of Appeals for the Sixth Circuit by writ of error. Act of March 3, 1891, c. 517, § 6, 26 Stat. 828. It is an action brought by the plaintiffs in error to recover the penalties prescribed for infringements of copyrights. Rev. Stat. §§ 4952, 4956, 4965, amended by Act of March 3, 1891, c. 565, 26 Stat. 1109, and Act of March 2, 1895, 28 Stat. 965. The alleged infringments consisted in the copying in reduced form of three chromolithographs prepared by employees of the plaintiffs for advertisements of a circus owned by one Wallace. Each of the three contained a portrait of Wallace in the corner and lettering bearing some slight relation to the scheme of decoration, indicating the subject of the design and the fact that the reality was to be seen at the circus. One of the designs was of an ordinary ballet, one of a number of men and women, described as the Stirk family, performing on bicycles, and one of groups of men and women whitened to represent statues. The Circuit Court directed a verdict for the defendant on the ground that the chromolithographs were not within the protection of the copyright law, and this ruling was sustained by the Circuit Court of Appeals. *Courier Lithographing Co.* v. *Donaldson Lithographing Co.*, 104 Fed. Rep. 993.

There was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things. *Gill* v. *United States*, 160 U. S. 426, 435; *Colliery Engineer Company* v. *United Correspondence Schools Company*, 94 Fed. Rep. 152; *Carte* v. *Evans*, 27 Fed. Rep. 861. It fairly might be found also that the copyrights were taken out in the proper names. One of them was taken out in the name of the Courier Company and the other two in the names of the Courier

Lithographing Company. The former was the name of an unincorporated joint stock association formed under the laws of New York, Laws of 1894, c. 235, and made up of the plaintiffs, the other a trade variant on that name. *Scribner* v. *Clark*, 50 Fed. Rep. 473, 474, 475; *S. C.*, *sub nom.* *Belford* v. *Scribner*, 144 U. S. 488.

Finally, there was evidence that the pictures were copyrighted before publication. There may be a question whether the use by the defendant for Wallace was not lawful within the terms of the contract with Wallace, or a more general one as to what rights the plaintiffs reserved. But we cannot pass upon these questions as matter of law; they will be for the jury when the case is tried again, and therefore we come at once to the ground of decision in the courts below. That ground was not found in any variance between pleading and proof, such as was put forward in argument, but in the nature and purpose of the designs.

We shall do no more than mention the suggestion that painting and engraving unless for a mechanical end are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs. *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53. It is obvious also that the plaintiff's case is not affected by the fact, if it be one, that the pictures represent actual groups—visible things. They seem from the testimony to have been composed from hints or description, not from sight of a performance. But even if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. *Blunt* v. *Patten*, 2 Paine, 397, 400. See *Kelly* v. *Morris*, L. R. 1 Eq. 697; *Morris* v. *Wright*, L. R. 5 Ch. 279. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.

If there is a restriction it is not to be found in the limited pretensions of these particular works. The least pretentious picture has more originality in it than directories and the like, which may be copyrighted. Drone, Copyright, 153. See *Henderson* v. *Tompkins*, 60 Fed. Rep. 758, 765. The amount of training required for humbler efforts than those before us is well indicated by Ruskin. "If any young person, after being taught what is, in polite circles, called 'drawing,' will try to copy the commonest piece of real *work*,—suppose a lithograph on the title page of a new opera air, or a woodcut in the cheapest illustrated newspaper of the day—they

will find themselves entirely beaten." Elements of Drawing, first ed. 3. There is no reason to doubt that these prints in their *ensemble* and in all their details, in their design and particular combinations of figures, lines and colors, are the original work of the plaintiffs' designer. If it be necessary, there is express testimony to that effect. It would be pressing the defendant's right to the verge, if not beyond, to leave the question of originality to the jury upon the evidence in this case, as was done in *Hegeman* v. *Springer*, 110 Fed. Rep. 374.

We assume that the construction of Rev. Stat. § 4952, allowing a copyright to the "author, designer, or proprietor . . . of any engraving, cut, print . . . [or] chromo" is affected by the act of 1874, c. 301, § 3, 18 Stat. 78, 79. That section provides that "in the construction of this act the words 'engraving,' 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts." We see no reason for taking the words "connected with the fine arts" as qualifying anything except the word "works," but it would not change our decision if we should assume further that they also qualified "pictorial illustrations," as the defendant contends.

These chromolithographs are "pictorial illustrations." The word "illustrations" does not mean that they must illustrate the text of a book, and that the etchings of Rembrandt or ~~Steinla's~~ Müller's engraving of the Madonna di San Sisto could not be protected to-day if any man were able to produce them. Again, the act however construed, does not mean that ordinary posters are not good enough to be considered within its scope. The antithesis to "illustrations or works connected with the fine arts" is not works of little merit or of humble degree, or illustrations addressed to the less educated classes; it is "prints or labels designed to be used for any other articles of manufacture." Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use—if use means to increase trade and to help to make money. A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement. And if pictures may be used to advertise soap, or the theatre, or monthly magazines, as they are, they may be used to advertise a circus. Of course, the ballet is as legitimate a subject for illustration as any other. A rule cannot be laid down that would excommunicate the paintings of Degas.

Finally, the special adaptation of these pictures to the advertisement of the Wallace shows does not prevent a copyright. That may be a circumstance for the jury to consider in determining the extent of Mr. Wallace's rights, but it is not a bar. Moreover, on the evidence, such prints are used by less pretentious exhibitions when those for whom they were prepared have given them up.

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustra-

tions, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights. See *Henderson* v. *Tomkins*, 60 Fed. Rep. 758, 765. We are of opinion that there was evidence that the plaintiffs have rights entitled to the protection of the law.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed and the cause remanded to that court with directions to set aside the verdict and grant a new trial.

True copy.

Test:

Clerk Supreme Court, U. S.

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[February 2d 1903.]

Mr. Justice Harlan dissenting.

Judges Lurton, Day and Severens, of the Circuit Court of Appeals, concurred in affirming the judgment of the District Court. Their views were thus expressed in an opinion delivered by Judge Lurton: "What we hold is this: That if a chromo, lithograph, or other print, engraving or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision, to protect the author in the exclusive use thereof, and the copyright statute should not be construed as including such a publication, if any other construction is admissible. If a mere label simply designating or describing an article to which it is attached, and which has no value separated from the article, does not come within the constitutional clause upon the subject of copyright, it must follow that a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisement, must be equally without the obvious meaning of the Constitution. It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act of June 18th 1874, amending the provisions of the copyright law. We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wallace's show. No evidence, aside from the deductions which are to be drawn from the prints themselves, was offered to show that these designs had any original artistic qualities. The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error. Many other points have been urged as justifying

the result reached in the court below. We find it unnecessary to express any opinion upon them, in view of the conclusion already announced. The judgment must be affirmed." *Courier Lithographing Co.* v. *Donaldson Lithographing Co.*, 104 *Fed. Rep.* 993, 996.

I entirely concur in these views, and therefore dissent from the opinion and judgment of this court. The clause of the Constitution giving Congress power to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective works and discoveries, does not, as I think, embrace a mere advertisement of a circus.

Mr. Justice McKenna authorizes me to say that he also dissents.

True copy.

Test:

Clerk Supreme Court, U. S.

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